

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Thursday, April 06, 2017

Hearing Room 1568

3:00 PM

2:17-13943 Unity Courier Service, Inc.

Chapter 11

#1.00 Hearing re [16] EMERGENCY MOTIONS FOR ORDER: USE OF CASH COLLATERAL

Docket 0

Tentative Ruling:

04/05/2017: This tentative ruling is subject to being modified or vacated as a result of any opposition that may be presented at the hearing. The Court is prepared to authorize the use of cash collateral on an interim basis. A final hearing on the use of cash collateral will take place on May 10, 2017, at 10:00 a.m.

Pleadings Filed and Reviewed:

- 1) Notice of Emergency Motion and Emergency Motions for Order: (1) Authorizing Honoring of Prepetition Wage and Payment Obligations; (2) Retention of Certain Bank Accounts and Banking Procedures; (3) Use of Cash Collateral; and (4) Borrowing on an Unsecured Basis in the Ordinary Course of Business [Doc. No. 16]
 - a) Declaration of Louis Lipson in Support of First Day Motions [Doc. No. 17]
 - b) Declaration of Larry Lum in Support of First Day Motions [Doc. No. 18]
 - c) Stipulation for Use of Cash Collateral [Doc. No. 19]
 - d) Statement Regarding Cash Collateral or Debtor in Possession Financing [Doc. No. 20]
 - e) Declaration of David W. Meadows Setting Forth Compliance with Order Setting Hearings on First Day Motions [Doc. No. 22]
- 2) Order Setting Hearing on First Day Motions [Doc. No. 13]
- 3) Opposition is due at the hearing

I. Facts and Summary of Pleadings

Unity Courier Service, Inc. (the "Debtor") commenced a voluntary Chapter 11 petition on March 31, 2017. The Debtor is a courier service that was founded in 1984. It has 800 employees working out of twelve offices located in California and Washington. The Debtor's customers include banking and financial institutions, retail establishments, professional organizations, and various other businesses.

In June 2013, judgment was entered against the Debtor in connection with a class action for unpaid wages. In 2008, the Debtor acquired certain assets of Trans-box

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Systems, another courier service. The June 2013 judgment was entered against the Debtor on a successor liability theory. The judgment is on appeal. On February 15, 2017, the class action judgment creditors (the "Brooks Class Claimants") served a judgment debtor examination order on the Debtor. The Brooks Class Claimants assert that they hold a lien against the Debtor in the amount of \$5,128,705.38. The Debtor disputes the lien, and contends that even if the lien is valid, it is avoidable as a preference. The Debtor filed for bankruptcy as a result of its inability to reach a settlement with the Brooks Class Claimants.

The Debtor seeks authorization to use cash collateral. The entities with an interest in cash collateral are Camco Resources, LLC ("Camco"), Steven Kelly Lopez (a non-insider) ("Lopez"), and the Brooks Class Claimants. Camco and Lopez have stipulated to the use of cash collateral (the "Cash Collateral Stipulation"). Camco is owed \$1,236,683.57 and Lopez is owed \$201,698. The material terms of the Cash Collateral Stipulation are as follows:

- 1) The Debtor stipulates that Camco holds a valid, perfected, first-priority lien, and stipulates to the validity of the pre-petition indebtedness secured by the lien. The Debtor stipulates that Lopez holds a valid lien senior to all liens other than Camco's, and stipulates to the validity of the pre-petition indebtedness secured by the lien. Notwithstanding the foregoing stipulations, any estate representative with standing (including an Official Committee of Unsecured Creditors) may file an adversary proceeding challenging Camco and Lopez's liens, provided that any such proceeding is commenced by no later than sixty days after the petition date.
- 2) The reasonable fees and costs incurred by the Prepetition Lenders in connection with the Cash Collateral Stipulation shall be added to the amount of the prepetition indebtedness.
- 3) No costs or expenses of administration shall be surcharged against the claims of the Prepetition lenders under §506(c), even if the Debtor's case is converted to Chapter 7 pursuant to §1112(b).
- 4) Camco and Lopez (collectively, the "Prepetition Lenders") shall receive the following as adequate protection:
 - a) Replacement liens with the same extent, validity, and priority as their pre-petition liens.
 - b) A superpriority administrative expense claim pursuant to §507(b), to the extent of the diminution in the value of the Prepetition Lenders' interests in the cash collateral. Camco's superpriority claim shall have priority over

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Lopez's superpriority claim. Both superpriority claims shall be subordinate to a carveout for payment of professional fees (the "Carveout"). The Carveout shall not exceed \$100,000.

- c) Monthly adequate protection payments, equal to the monthly prepetition payments that the Debtor made on account of the indebtedness (\$36,251 to Camco and \$1,698 to Lopez).

For the 90-day period between April and June 2017, the Debtor projects monthly cash receipts ranging between \$3.78 and \$3.84 million. The Debtor's principal expenses are as follows:

- 1) Wages: \$1,467,692
- 2) Automobile Allowance: \$598,308
- 3) Taxes: \$479,574
- 4) Workers' Compensation: \$296,374
- 5) Automobile Expenses: Approximately \$219,000
- 6) Outside Services: \$197,312
- 7) Insurance: \$148,187

The Debtor seeks a 15% line-item variance to the cash collateral budget (the "Budget").

The Debtor's controller, Louis Lipson, submits a declaration regarding the Debtor's finances. According to Lipson, as of March 31, 2017 (the petition date), the Debtor had approximately \$3,264,436 in collectible accounts receivables and \$23,017 cash on hand. Lipson Decl. at ¶12. Lipson projects that the Debtor will generate an additional \$1.1 million in collectible accounts receivables by April 4, 2017. *Id.* Not including the disputed lien of the Brooks Class Claimants, as of the petition date, the Debtor had total assets of \$4,018,608 and total liabilities of \$3,749,428, according to Lipson. *Id.* at ¶15. Lipson projects that during the 90-day period between April and June 2017, the Debtor will receive \$11,421,814 in cash and disburse a total of \$11,331,761, leaving a cash balance of \$90,051 at the end of the period. *Id.* at ¶20.

The Debtor asserts that the Brooks Class Claimants are adequately protected because Lipson's projections indicate that the value of the Debtor's cash collateral will increase. Specifically, the Debtor had \$23,017 cash on hand as of the petition date, but is projected to have \$90,051 cash on hand at the end of June 2017. As further adequate protection, the Debtor will provide the Brooks Class Claimants a replacement lien to the same extent, validity, and priority of its prepetition lien.

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II. Findings and Conclusions

Section 363(c)(2) requires court authorization for the use of cash collateral unless "each entity that has an interest in such cash collateral consents." In the Ninth Circuit, satisfaction of Section 363(c)(2)(A) requires the "affirmative express consent" of the secured creditor; "implied consent," resulting from the failure of the secured creditor to object to use of cash collateral, does not satisfy the requirements of the statute. *Freightliner Market Development Corp. v. Silver Wheel Freightlines, Inc.*, 823 F.2d 362, 368-69 (9th Cir. 1987). Absent affirmative express consent, the Debtors "may not use" cash collateral absent the Court's determination that the use is "in accordance with the provisions" of Section 363—that is, that the secured creditor's interest in the cash collateral is adequately protected. Section 363(c)(2)(B); Section 363(e).

A secured creditor's interest is adequately protected if the value of its collateral is not declining; the secured creditor is not entitled to payment to compensate for its inability to foreclose upon the collateral during bankruptcy proceedings. *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988).

The Court Approves the Cash Collateral Stipulation With Certain Modifications

The Court finds that the Cash Collateral Stipulation is generally appropriate, but will require that certain modifications be made. The stipulation's provisions regarding the validity and enforceability of the Prepetition Lenders' liens and indebtedness are acceptable, given that an estate representative such as an Official Committee of Unsecured Creditors has the opportunity to challenge the liens within sixty days of the filing of the petition.

The provision barring any surcharge of the Prepetition Lenders' claims, even if the case is converted to Chapter 7, must be modified. The Debtor may waive its rights to surcharge the Prepetition Lenders' claims during the period when the case is proceeding under Chapter 11, but may not waive the surcharge rights of a future Chapter 7 Trustee in the event the case is converted. Such a waiver would leave any future Chapter 7 Trustee in the untenable position of being required to care for and preserve the Prepetition Lenders' collateral but lacking the means to discharge that duty.

The Carveout of up to \$100,000 for the payment of professional fees is approved. A noticed fee application is required prior to the payment of any fees to professionals.

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The Brooks Class Claimants' Interest is Adequately Protected

The Court finds that the Brooks Class Claimants' interest in the cash collateral is adequately protected. Adequate protection is provided by the replacement lien and by the fact that the Debtor's financial projections indicate that the cash collateral is not declining in value. In addition, the Debtor's expenditures will generate replacement income, another form of adequate protection. *See In re Megan-Racine Associates, Inc.*, 202 B.R. 660, 663 (Bankr. S.D.N.Y. 1996) (concluding that "[a]s long as there was a continuous income stream being generated by the Debtor, the fact that the Debtor consumed a portion of those monies to operate and maintain the facility each month did not diminish the value of the [secured creditor's] interest in the [cash collateral]").

The Debtor Will Suffer Irreparable Harm Absent Interim Use of Cash Collateral

The Court finds that the Debtor will suffer irreparable harm absent the interim use of cash collateral. Use of cash collateral is necessary for the Debtor to pay its 800 employees, who work as couriers. If not paid, a large percentage of the employees would likely leave, and the Debtor would be unable to operate its business. The Court finds that all of the expenditures set forth in the Budget are necessary to avoid irreparable harm to the estate. The Court finds that there is a reasonable likelihood that the Debtor will prevail at the final hearing on the use of cash collateral. *See* §363 (c)(3). The order approving the interim use of cash collateral will take effect immediately upon entry.

The Court will conduct a final hearing on the use of cash collateral on May 10, 2017, at 10:00 a.m. The Debtor must submit further evidence in support of the use of cash collateral by no later than April 26, 2017. The additional evidence shall include an updated budget and updated financial projections. Any opposition to the continued use of cash collateral must be submitted by no later than May 3, 2017.

Party Information

Debtor(s):

Unity Courier Service, Inc.

Represented By
Ira Benjamin Katz

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#2.00 Hearing re [16] EMERGENCY MOTIONS FOR ORDER: RETENTION OF CERTAIN BANK ACCOUNTS AND BANKING PROCEDURES

Docket 0

Tentative Ruling:

04/05/2017: This tentative ruling is subject to being modified or vacated as a result of any opposition that may be presented at the hearing. The Court is prepared to grant the motions to pay prepetition wages and to temporarily maintain prepetition bank accounts.

Pleadings Filed and Reviewed

- 1) Notice of Emergency Motion and Emergency Motions for Order: 1) Authorizing Honoring of Prepetition Wage and Payment Obligations; 2) Retention of Certain Bank Accounts and Banking Procedures; 3) Use of Cash Collateral; and 4) Borrowing on an Unsecured Basis in the Ordinary Course of Business; Memorandum of Points and Authorities in Support Thereof ("Motion") [Doc. No. 16]
- 2) Declaration of Louis Lipson in Support of First Day Motions ("Lipson Decl.") [Doc. No. 17]

Facts and Summary of Pleadings

Background information on the Debtor and the Debtor's bankruptcy case is set forth in the tentative ruling on the Debtor's Motion to Use Cash Collateral (Calendar No. 1).

Motion to Pay Prepetition Wages

The Debtor filed the Motion on April 4, 2017. Doc. No. 16. The Debtor requests authority to pay prepetition wages, compensation, and benefits incurred during the two weeks between March 18 and March 31, 2017. The Motion states that no payment to any individual will exceed \$12,850.00 and no payments will be made

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to any insider. Specifically, the requested payments include employee wages and salaries, estimated at \$1,034,620.41; outstanding paychecks amounting to \$113,452.97; expected garnishments of \$3,243.05; employee deductions for payroll taxes and FICA in the amount of \$239,787.43; and compensation for eleven independent contractors of \$30,356.00. Lipson Decl., Ex 1 (spreadsheet listing proposed payments to each recipient). The Debtor further requests an additional \$25,000 cushion, as employee payroll amounts are based on actual deliveries made per courier. Including the cushion, total payments amount to \$1,446,459.86. The Debtor contends that the requested payments are critically necessary to retain the Debtor's workforce and continue business operations. Finally, the Motions seeks waiver of notice under Federal Rule of Bankruptcy Procedure ("FRBP") 6004(a) and waiver of the 14-day stay under FRBP 6004(h), so that employee checks can be promptly delivered on April 7, 2017.

Motion to Maintain Prepetition Bank Accounts

The Debtor seeks to temporarily maintain two prepetition bank accounts. More specifically, the Debtor summarizes the following:

Money Market Account: The Debtor used this account for depositing customer checks and transferring disbursements. The account closed on March 31, 2017.

Disbursement Account: The Debtor maintained this account for ordinary course payments and outgoing Automated Clearing House ("ACH") payments to vendors as well as paying some taxes. The account closed on March 31, 2017.

Payroll Account: The Debtor used this account for employee check payments and taxes to the Internal Revenue Service. All payments are made by check. The account closed on March 31, 2017.

ETF Account: The Debtor continues to keep this account open to process ACH transfers and credit card payments.

Credit Line Accounts: The Debtor continues to use this account to support the Debtor's payment obligations. This account is open and paid down to zero.

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The Debtor requests waiver of the UST requirements in immediately closing the ETF and Credit Line Accounts until the Debtor can open new accounts at an approved depository.[**Note 1**] The Debtor is undertaking steps to open new accounts at Citizens Business Bank, which could take approximately two to four weeks. The Debtor avers that the ETF Account is necessary to continue the uninterrupted collection of funds [**Note 2**]. The Credit Line Account is necessary in the event the Debtor lacks sufficient cash on hand to fully meet the payroll obligations that come due on April 7, 2017.

Findings of Fact and Conclusions of Law

Motion to Pay Prepetition Wages

Section 507(a)(4) designates "wages, salaries, or commissions, including vacation, severance, and sick leave pay" that are earned by an individual "within 180 days before the date of the filing of the petition" as a fourth-priority claim. Since the Debtor filed its voluntary chapter 11 petition on March 31, 2017, only wages that were earned by the end of the day on March 31, 2017, are entitled to priority. Additionally, § 507(a)(4) imposes a limit of \$12,850.00 for each individual employee for priority status.

"Because wages are priority claims, courts have often permitted debtors to pay prepetition wage claims in the ordinary course in response to a motion filed by a debtor in possession at the commencement of a chapter 11 case. The ability to ensure that the employees receive their unpaid prepetition salary and do not miss a paycheck is critical to obtaining the stability necessary for the transition to operating as a debtor in possession. If wage claims were not entitled to priority, it would be difficult to justify 'first day' orders approving payments of prepetition wages. There is no clear statutory authority for such first day orders, although a court with some confidence in the debtor's ability to satisfy claims through the third priority could justify the order under section 105." Collier on Bankruptcy, § 507.05[2] (rev'd 15th ed.).

Local Bankruptcy Rule 2081-1(a) provides that a motion to pay prepetition payroll must be supported by evidence that establishes the following: "(A) The employees are still employed; (B) The necessity for payment; (C) The benefit of the

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procedures; (D) The prospect of reorganization; (E) Whether the employees are insiders; (F) Whether the employees' claims are within the limits established by 11 U.S.C. § 507; and that (G) The payment will not render the estate administratively insolvent."

As indicated by the Declaration of Louis Lipson, all employees to whom the Debtor seeks to pay prepetition wages and benefits are still employed. The Lipson Decl. further provides that payment is necessary and will benefit the estate. Exhibit 1 to the Lipson Decl. indicates each respective employee's name and the amount of wages and benefits to be afforded to each employee, all of which are under the \$12,850 limit of Section 507(a)(4). It also includes the eleven independent contractors, the projected payroll related expenses, the expected garnishments, and the outstanding checks still owed to current employees. None of the employees is designated as an insider. As to the prospects for reorganization, the ninety (90) day projected budget ("Budget") attached to the Lipson Decl. shows an expected positive cash flow through June 2017. Lipson Decl., Ex. 2. Finally, payment of prepetition wages and benefits will not render the estate administratively insolvent because the Debtor continues to accrue cash receipts and incorporates the requested payments in the Budget as being in the ordinary course of business. The Court finds that the employee wages, compensation, payroll taxes, expected garnishments, outstanding checks, and payments to the eleven independent contractors are necessary and beneficial for the continuance of the Debtor's business. The Court notes that the notice requirement under FRBP 6004(a) does not apply as the request payments are in the ordinary course of business. (FRBP 6004(a) applies only to the use of estate property not in the ordinary course of business.)

Motion to Maintain Prepetition Bank Accounts

LBR 2015-2 requires that a debtor comply with the U.S. Trustee Guidelines and Requirements ("UST Requirements"). The UST Requirements demand that a chapter 11 debtor-in-possession open new bank accounts and close all existing accounts. *See United States Trustee Guidelines*, <https://www.justice.gov/ust-regions-r17/us-trustees-guidelines>. Further, the new bank accounts must be opened in depositories approved by the U.S. Trustee. *Id.* Here, requiring the Debtor to strictly comply with the UST Requirements would significantly interrupt the Debtor's business by hindering future customer deposits and accounts receivables as well as

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negating the Debtor's ability to use its existing Credit Line to cover any cash shortages. The Debtor contemplates opening new accounts and requests merely an additional two to four weeks to comply with the UST Requirements. Therefore, the Court authorizes the Debtor to temporarily maintain the ETF and Credit Line Account. The accounts must be closed by no later than April 5, 2017.

Based on the foregoing, the Court GRANTS the Motion. The Debtor is authorized to remit payments consistent with Exhibit 1 attached to the Lipson Decl., including the requested possible variance of \$25,000.00. Further, the Court authorizes the Debtor to temporarily maintain the ETF and Credit Line Account, provided the accounts are closed by no later than April 5, 2017. To the extent the 14-day stay prescribed by FRBP §6004(h) is applicable, it is waived.

Note 1: Community Bank maintained all of the Debtor's accounts, yet is not listed as an approved depository by the Office of the United States Trustee.

Note 2: The Debtor received approximately \$170,000.00 in post-petition revenue as of April 3, 2017.

Party Information

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**#3.00 Hearing re [16] EMERGENCY MOTIONS FOR ORDER: BORROWING ON AN
UNSECURED BASIS IN THE ORDINARY COURSE OF BUSINESS**

Docket 0

Tentative Ruling:

4/05/2017: This tentative ruling is subject to being modified or vacated as a result of any opposition that may be presented at the hearing. The Court is prepared to authorize the Debtor to obtain unsecured credit on an interim basis. A final hearing on the Debtor's financing motion will take place on May 10, 2017, at 10:00 a.m.

Pleadings Filed and Reviewed:

- 1) Notice of Emergency Motion and Emergency Motions for Order: (1) Authorizing Honoring of Prepetition Wage and Payment Obligations; (2) Retention of Certain Bank Accounts and Banking Procedures; (3) Use of Cash Collateral; and (4) Borrowing on an Unsecured Basis in the Ordinary Course of Business [Doc. No. 16]
 - a) Declaration of Louis Lipson in Support of First Day Motions [Doc. No. 17]
 - b) Declaration of Larry Lum in Support of First Day Motions [Doc. No. 18]
 - c) Statement Regarding Cash Collateral or Debtor in Possession Financing [Doc. No. 20]
 - d) Declaration of David W. Meadows Setting Forth Compliance with Order Setting Hearings on First Day Motions [Doc. No. 22]
- 2) Order Setting Hearing on First Day Motions [Doc. No. 13]
- 3) Opposition is due at the hearing

I. Facts and Summary of Pleadings

The background on the Debtor and this case is set forth in the Court's tentative ruling on the Debtor's motion to use cash collateral (Calendar No. 1) and is not repeated here.

The Debtor seeks authorization to obtain unsecured credit. The Debtor holds a credit line in the amount of \$750,000 at Community Bank. As of the petition date, the credit line has a zero balance. The credit line is not secured by any of the Debtor's assets, but is guaranteed by the Debtor's principals, Larry Lum and Ali Sharifi.

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Advances from the credit line bear interest at the rate of 2.35% per annum. The Debtor contends that, pursuant to §364(a), it is entitled to use the Community Bank credit line in the ordinary course of business absent court authorization. However, in order to allay the concerns of its lender, the Debtor seeks Court authorization to borrow pursuant to §364(b). The Debtor is unsure whether Community Bank will continue to extend credit in view of the filing of the petition. Lum Decl. at ¶5 (“On March 30, I spoke with Nicolette Schwartz, Vice President/Senior Relationship Manager at Community Bank... I apprised Ms. Schwartz that the Debtor intended to file a Chapter 11 petition for relief and inquired whether Community Bank would agree to keep the credit line in place after the petition was filed I did not receive a definitive response, but anticipate that Community Bank may not choose to maintain the credit line in place.”)

The Debtor believes that it will have sufficient cash on hand to fund the payroll obligations coming due on April 7, 2017. Lum Decl. at ¶8. In the event the Debtor does not have sufficient cash on hand, it intends to partially fund April 7 payroll obligations from the Community Bank credit line. If Community Bank terminates the credit line, the Debtor intends to borrow funds on the same terms from a friend of the Debtor’s president. *Id.* at ¶7. The Debtor intends to establish a new credit line at Citizens Business Bank with terms comparable to its existing credit line. It will take at least two weeks for Citizens Business Bank to approve the new credit line. Lum Decl. at ¶6.

II. Findings and Conclusions

Section 364(a) permits the Debtor to “obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense” without Court authorization. Section 364(b) provides that the Court may authorize the Debtor “to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.”

Pursuant to §364(a), the Debtor may continue to borrow on an unsecured basis from its existing credit line at Community Bank without Court authorization. To insure that the Debtor has access to funds and to alleviate any concerns of Community Bank or any future lender, the Court will enter an order pursuant to §364(b), authorizing the Debtor to borrow, on an interim basis, from its Community Bank credit line. **[Note 1]** The Court further authorizes the Debtor to obtain a new credit line from Citizens Business Bank (or another institution on the United States

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Trustee's list of authorized depositories), provided that the terms of the line are comparable to those of the Debtor's existing line. If Community Bank terminates the Debtor's credit line before the Debtor can obtain a replacement line, the Debtor is authorized to borrow funds from associates of the Debtor's president, but only to the extent absolutely necessary to maintain operations. The Court finds that the estate will be irreparably harmed absent this interim authorization of borrowing. The order approving interim borrowing will take effect immediately upon entry.

A final hearing on the Debtor's motion to obtain unsecured credit will take place on May 10, 2017, at 10:00 a.m. By no later than April 26, 2017, the Debtor must submit further evidence in support of the Motion, including an update on its efforts to obtain a replacement credit line from Citizens Business Bank. Any opposition to the Motion must be submitted by no later than May 3, 2017.

Note 1

The proposed order submitted by the Debtor seeks approval of the financing pursuant to both §364(a) and (b). The Court will approve the financing only under § 364(b). A Court order authorizing financing under §364(a) is inconsistent with the plain language of the statute, given that §364(a) authorizes the Debtor to borrow without obtaining Court authorization.

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**#4.00 Hearing re [16] EMERGENCY MOTIONS FOR ORDER: AUTHORIZING HONORING OF
PREPETITION WAGE AND PAYMENT OBLIGATIONS**

Docket 0

Tentative Ruling:

04/05/2017: See Cal. No. 2, above, incorporated in full by reference.

Party Information

Debtor(s):

Unity Courier Service, Inc.

Represented By
Ira Benjamin Katz